

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JUDITH NORTON)	
Claimant)	
VS.)	
)	Docket No. 205,757
KOBE STEAKHOUSE)	
Respondent)	
AND)	
)	
AMERICAN STATES INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant appeals the October 9, 2000, Award of Administrative Law Judge Bryce D. Benedict. Claimant was granted a 62.5 percent permanent partial general disability based upon a 90 percent loss of task performing abilities and a 35 percent loss of wages. Additionally, the Administrative Law Judge found claimant suffered a 17 percent whole body functional impairment for the injuries suffered on June 9, 1994. Oral argument before the Board was held on April 4, 2001.

APPEARANCES

Claimant appeared by her attorney, George H. Pearson of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Matthew S. Crowley of Topeka, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations as contained in the Award.

ISSUES

What is the nature and extent of claimant's disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant worked as a receptionist and bookkeeper for respondent and had performed those duties for three to four years. On June 9, 1994, while lifting boxes of frozen food weighing up to 200 pounds, claimant suffered a low back injury. She described it as feeling like a muscle pull in her groin which gradually grew more severe, with the pain rotating around into her lower back and radiating down into her left leg. Claimant sought treatment from several physicians, ultimately ending up under the care of K. N. Arjunan, M.D., who performed a laminectomy discectomy at L4-5 on April 6, 1995.

Claimant's history is significant in that she had an L5-S1 discectomy performed by Dr. Woods in October 1977. However, claimant recovered from that surgery and was able to return to the work force. After the April 6 surgery with Dr. Arjunan, claimant experienced additional problems. She was referred to Glenn M. Amundson, M.D., an orthopedic surgeon at the University of Kansas Medical Center. Dr. Amundson first saw claimant on October 24, 1995, at which time he diagnosed a failed laminectomy with instability at the L4-5 level. In April 1996, he performed an L4-5 decompression, an L3-4 decompression and an L3-S1 instrumented fusion.

Claimant appeared to be improving until she was referred to physical therapy. During physical therapy, claimant began experiencing additional pain. On September 12, 1997, claimant underwent an additional surgery with Dr. Amundson, at which time he performed instrumentation removal, exploration of her fusion, and a redo of the disc excision decompression at the L4-5 level on the left side.

At the time the doctor examined her in November 1997, claimant was doing poorly and having significant pain. By January 1998, claimant appeared to be improving. However, in February 1998, after several weeks of physical therapy, claimant again worsened. She developed problems with depression and difficulty sleeping. Claimant's problems continued to deteriorate with her pain increasing to the levels previous to the surgeries.

Dr. Amundson rated claimant at 25 percent to the whole body based upon the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition. He also restricted her to functioning at basically a sedentary or less level. He opined claimant was not capable of any substantial and gainful employment, testifying that on a bad day she would not be able to work at all. On good days, she would require periods of recumbency which he did not believe any employer would be able to accommodate.

Dr. Amundson was provided a task list prepared by Michael Dreiling, showing the tasks performed by claimant over the previous 15 years. He did not believe claimant capable of performing any of the fifteen tasks.

At the request of respondent's attorney, claimant was referred to Phillip L. Baker, M.D., an orthopedic surgeon with Kansas Orthopedics and Sports Medicine. Dr. Baker examined and evaluated claimant, opining that, as a result of the 1994 accident, she suffered a 17 percent impairment to the body as a whole when utilizing the AMA Guides, Third Edition (Revised), and a 20 percent impairment to the body as a whole when utilizing the AMA Guides, Fourth Edition. As claimant's accident date of June 9, 1994, mandates the use of the Third Edition (Revised), the Appeals Board affirms the Administrative Law Judge's finding that only Dr. Baker's 17 percent impairment rating to the body as a whole satisfies the statutory mandate of K.S.A. 44-510e (Furse).

Dr. Baker was also provided Mr. Dreiling's task list from which the doctor opined claimant was capable of performing two of the fifteen tasks outright, and an additional task, number 6, if the climbing in that task indicated only stair climbing. This would result in an 80 percent loss of task performing abilities. The Appeals Board finds, under these circumstances, the 90 percent loss of task performing ability reached by the Administrative Law Judge after averaging the opinions of Dr. Baker and Dr. Amundson to be appropriate.

After her last surgery with Dr. Amundson, claimant did not return to any type of employment. In fact, claimant has not attempted to return to any type of employment and is currently receiving Social Security disability benefits.

Claimant did enroll in a medical transcriptionist correspondence course which she was unable to finish because of the pain radiating into her back and down into her legs. Claimant testified that her concentration is extremely limited due to the pain associated with her back.

Dr. Baker testified claimant was capable of performing sedentary work but cautioned against allowing claimant to sit for long periods of time. He felt claimant could sit for 40 minutes out of every hour and must be up and moving around 20 minutes of every hour. He acknowledged he was not certain whether she could tolerate the 40 minutes of sitting, but stated that she would have to start someplace. He recommended she frequently change positions, if possible. He further limited claimant to 10 pounds lifting or less. Dr. Baker acknowledged claimant had developed several additional conditions since her last surgery which are not related to her employment. These include incontinence, a mild stroke and significant vision problems. In discussing her limitations and his restrictions, Dr. Baker acknowledged he limited his testimony to her low back condition and its related symptoms. He did acknowledge that, regarding her back condition, in the broad sense of employment, he felt claimant to be unemployable. He testified that there were jobs he felt claimant could do, but they would have to be extremely light, with the recommended position changes being allowed frequently.

After reviewing the medical evidence and the testimonies of both Dr. Amundson and Dr. Baker, the Appeals Board finds claimant is permanently and totally disabled. While

there are certain tasks claimant could possibly do, it appears, based upon the testimony of the medical experts, that claimant would be extremely limited in her ability to obtain any type of employment and it would require only the perfect situation to allow her to return to work. Unfortunately, that perfect situation has yet to arise. In reviewing claimant's testimony, the Appeals Board doubts that any such position would arise since, as testified to by Dr. Amundson, claimant would require periods of recumbency during the day, i.e., periods when claimant would be required to lie down.

The Kansas Court of Appeals, in Wardlow v. ANR Freight Systems, 19 Kan. App. 2d 110, 872 P.2d 299 (1993), was asked to consider whether a truck driver was permanently totally disabled after suffering an accident during which his lower back, pelvis, right hip and right thigh were fractured, with a possible fracture of his right ankle. The claimant, Wardlow, underwent three separate surgeries, and an external frame was temporarily attached to his pelvis to stabilize the fractures. Wardlow, like this claimant, had neither worked nor sought employment since his accident. In Wardlow's situation, the claimant had severe physical impairments and a substantial lack of transferrable skills which made him "essentially unemployable." The Board notes, in this instance, this claimant has substantially more transferrable skills than Wardlow. Nevertheless, the significant amounts of pain which claimant is forced to endure has a direct effect on her ability to concentrate. This would severely hamper, if not prevent, claimant from performing mentally challenging jobs such as accounting, bookkeeping, secretarial work or supervisory work, as was discussed by Mr. Dreiling in his deposition. The Appeals Board, after considering the entire record, finds that claimant, Judith Norton, is essentially and realistically unemployable. She is severely limited physically and, due to her ongoing pain complaints, severely restricted in her ability to perform mentally challenging jobs.

Wherefore, the Appeals Board finds that the Award of the Administrative Law Judge should be modified to grant claimant permanent total disability compensation for the injuries suffered on June 9, 1994.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bryce D. Benedict dated October 9, 2000, should be, and is hereby, modified, and an award of compensation is made in favor of the claimant, Judith Norton, and against the respondent, Kobe Steakhouse, and its insurance carrier, American States Insurance Company, for an injury suffered on June 9, 1994, and based upon an average weekly wage of \$316.21.

Claimant is entitled to 206.71 weeks temporary total disability compensation at the rate of \$210.91 per week totaling \$43,597.21, followed by weekly compensation at the rate of \$210.91 per week, for a total award not to exceed \$125,000.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the opinions contained herein.

IT IS SO ORDERED.

Dated this ____ day of May 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: George H. Pearson, Topeka, KS
Matthew S. Crowley, Topeka, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director